Nos. 09-579 and 09-580

# In the Supreme Court of the United States

SHELDON PETERS WOLFCHILD, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

HARLEY D. ZEPHIER, SR., ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether three appropriations acts passed in 1888, 1889, and 1890 created a trust for the benefit of certain Mdewakanton Sioux and their descendants.

2. If those appropriations acts created such a trust, whether Congress terminated that trust with the enactment of legislation in 1980 that placed the lands purchased with the appropriated funds in trust for three Indian communities.

## TABLE OF CONTENTS


Page

Opinions below ..... 1
Jurisdiction ..... 2
Statement ..... 2
Argument ..... 9
Conclusion ..... 18


## TABLE OF AUTHORITIES

Cases:


*Auer* v. *Robbins*, 519 U.S. 452 (1997) ..... 13
*Carcieri* v. *Salazar*, 129 S. Ct. 1058 (2009) ..... 12
*Cermak* v. *Babbitt*, 234 F.3d 1356 (Fed. Cir. 2000), cert. denied, 532 U.S. 1021 (2001) ..... 4, 17
*Cermak* v. *United States*, 478 F.3d 953 (8th Cir. 2007) ..... 4, 17
*Cutter* v. *Wilkinson*, 544 U.S. 709 (2005) ..... 13
*New Hampshire* v. *Maine*, 532 U.S. 742 (2001) ..... 16
*OPM* v. *Richmond*, 496 U.S. 414 (1990) ..... 16
*United States* v. *Navajo Nation*, 129 S. Ct. 1547 (2009) ..... 10
*United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) ..... 10


Statutes:


Act of Feb. 16, 1863, ch. 37, 12 Stat. 652:
§ 1, 12 Stat. 652 ..... 2, 14
§ 9, 12 Stat. 654 ..... 2, 13

Statutes—Continued: Page

Act of June 29, 1888, ch. 503, 25 Stat. 217 ..... 2
§ 1, 25 Stat. 217:
25 Stat. 228-229 ..... 3, 11
25 Stat. 229 ..... 6, 11
Act of Mar. 2, 1889, ch. 412, 25 Stat. 980 ..... 2
§ 1, 25 Stat. 980:
25 Stat. 992 ..... 3, 11
25 Stat. 993 ..... 7, 11
Act of Aug. 19, 1890, ch. 807, 26 Stat. 336 ..... 2
§ 1, 26 Stat. 349 ..... 4, 11
Act of Dec. 19, 1980, Pub. L. No. 96-557, 94 Stat. 3262 .... 5
§ 1, 94 Stat. 3262 ..... 5, 15
§ 3, 94 Stat. 3262 ..... 5, 6, 17
General Allotment Act, 25 U.S.C. 348 ..... 4
Indian Reorganization Act, 25 U.S.C. 461 *et seq.* ..... 4
25 U.S.C. 465 ..... 12
25 U.S.C. 479 ..... 12
28 U.S.C. 1292(d)(2) ..... 7

Miscellaneous:

H.R. Rep. No. 1409, 96th Cong., 2d Sess. (1980) .... 4, 5, 15
S. Rep. No. 1047, 96th Cong., 2d Sess. (1980) ..... 4, 5, 15

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-75) is reported at 559 F.3d 1228.[1] The opinion of the Court of Federal Claims (Pet. App. 76-111) is reported at 78 Fed. Cl. 472. Earlier opinions of the Court of Federal Claims are reported at 77 Fed. Cl. 22, 72 Fed. Cl. 511, 68 Fed. Cl. 779, and 62 Fed. Cl. 521.

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and the petition appendix in No. 09-579.

## JURISDICTION

The judgment of the court of appeals was entered on March 10, 2009. A petition for rehearing was denied on June 11, 2009 (Pet. App. 112-116). On August 20, 2009, the Chief Justice extended the time within which to file petitions for a writ of certiorari to and including November 6, 2009, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In 1862, the Minnesota Sioux revolted against the United States. Pet. App. 6. After the Army suppressed the uprising, Congress annulled all treaties with the Minnesota Sioux and confiscated Sioux lands in the State. Act of Feb. 16, 1863 (1863 Act), ch. 37, § 1, 12 Stat. 652. Some of the Sioux in Minnesota had opposed the revolt. Pet. App. 6-7. Congress permitted those Sioux—known as the "loyal Mdewakantons" because they were affiliated with the Mdewakanton band of the Sioux Tribe—to remain in Minnesota, *id.* at 7-9, and it authorized the Secretary of the Interior to give 80 acres of land "to each individual * * * who exerted himself in rescuing the whites from the late massacre of said Indians," 1863 Act § 9, 12 Stat. 654. The Secretary did not exercise that authority, and the Sioux remaining in Minnesota sank into poverty. Pet. App. 8-9.

In 1888, 1889, and 1890, Congress passed appropriations statutes, each of which included a long series of specifically designated appropriations for the Indian Department, particular Indian Tribes, and other purposes. Act of June 29, 1888 (1888 Appropriations Act), ch. 503, 25 Stat. 217; Act of Mar. 2, 1889 (1889 Appropriations Act), ch. 412, 25 Stat. 980; Act of Aug. 19, 1890

(1890 Appropriations Act), ch. 807, 26 Stat. 336. The appropriated funds included money for the Mdewakanton Sioux in Minnesota. In particular, the 1888 Appropriations Act appropriated $20,000:

> For the support of the full-blood Indians in Minnesota, belonging to the Medawakanton band of Sioux Indians, who have resided in said State since [May 20, 1886], and severed their tribal relations * * * to be expended by the Secretary of the Interior in the purchase, in such manner as in his judgment he may deem best, of agricultural implements, cattle, horses, and lands.

§ 1, 25 Stat. 228-229. In the 1889 Appropriations Act, Congress appropriated $12,000:

> For the support of the full-blood Indians in Minnesota heretofore belonging to the Medawakanton band of Sioux Indians, who have resided in said State since [May 20, 1886], or who were then engaged in removing to said State, and have since resided therein, and have severed their tribal relations * * * to be expended by the Secretary of the Interior * * * [for] the purchase, as in his judgment he may think best, of such lands, agricultural implements, seeds, cattle, horses, food, or clothing as may deemed best in the case of each of these Indians or family thereof.

§ 1, 25 Stat. 992. Finally, the 1890 Appropriations Act appropriated $8,000:

> For the support of the full and mixed blood Indians in Minnesota heretofore belonging to the Medawakanton band of Sioux Indians, who have resided in said State since [May 20, 1886], or who were

> then engaged in removing to said State, and have since resided therein, and have severed their tribal relations, * * * to be expended by the Secretary of the Interior, as in his judgment he may think best, for such lands, agricultural implements, buildings, seeds, cattle, horses, food, or clothing as may be deemed best in the case of each of these Indians or families thereof.

§ 1, 26 Stat. 349.

With the funds appropriated by the Appropriations Acts, the Secretary purchased lands in Minnesota, which have come to be referred to as the "1886 lands" because the funds used to purchase them were appropriated for Indians present in Minnesota in 1886. See H.R. Rep. No. 1409, 96th Cong., 2d Sess. 2 (1980) (*House Report*). Beginning in 1904, the Secretary assigned 1886 lands to individual loyal Mdewakantons through "Indian Land Certificates." See *Cermak* v. *United States*, 478 F.3d 953, 954 (8th Cir. 2007). The certificates "convey[ed] only temporary use and occupancy rights to individual Indians" and did not effect allotments under the General Allotment Act, 25 U.S.C. 348. *Cermak* v. *Babbitt*, 234 F.3d 1356, 1363 (Fed. Cir. 2000), cert. denied, 532 U.S. 1021 (2001).

Under the Indian Reorganization Act (IRA), 25 U.S.C. 461 *et seq.*, three Indian communities—the Lower Sioux Indian Community, the Prairie Island Indian Community, and the Shakopee Mdewakanton Sioux—were formed in the areas where the 1886 lands were located. Lands were acquired in trust for those communities, each of which included descendants of the loyal Mdewakanton who had been assigned Indian Land Certificates for 1886 lands. *House Report* 2, 4; S. Rep. No. 1047, 96th Cong., 2d Sess. 2 (1980) (*Senate Report*).

By 1980, the communities' areas included two types of lands: lands acquired in trust for the federally-recognized communities under the IRA, and 1886 lands assigned to individual loyal Mdewakantons. The communities' bylaws and constitutions "established two classes of members: all members of the community who were entitled to the benefits of the tribal lands acquired under the [IRA] and members who were descendants of the 1886 Mdewakanton and who had exclusive rights to the benefits of the 1886 lands." *House Report* 2. The 1886 lands were interspersed among the land held in trust for the communities, "result[ing] [in] a checkerboard pattern of land use[] that severely diminishe[d] the effectiveness of overall land management programs and community development." *Senate Report* 2.

In 1980, Congress placed the 1886 lands in trust for the three communities to simplify and clarify the status of the lands in the communities and remedy the problems caused by the checkerboard of property interests. Act of Dec. 19, 1980 (1980 Act), Pub. L. No. 96-557, 94 Stat. 3262. The 1980 Act provided:

> [A]ll right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such lands) which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the [1888, 1889, and 1890 Appropriations Acts], are hereby declared to hereafter be held by the United States * * * in trust for the [respective community].

1980 Act § 1, 94 Stat. 3262. Section 3 of the 1980 Act protected existing assignments: "Nothing in this Act shall (1) alter, or require the alteration, of any rights

under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment." 94 Stat. 3262.

2. Petitioners are individuals who claim to be descendants of the loyal Mdewakanton, and who brought this action in the United States Court of Federal Claims (CFC) seeking damages from the United States. Pet. App. 16. Petitioners argued that the Appropriations Acts created a trust for the loyal Mdewakanton and their lineal descendants that gives them rights to the proceeds of the trust corpus through their status as holders of equitable title to the 1886 lands. *Ibid.* Petitioners assert that the United States breached its trust obligation by failing to ensure that the uses and benefits of the 1886 lands would accrue to the beneficiaries alone and be distributed as equally as practicable among all of the petitioners. *Id.* at 17.

The CFC granted partial summary judgment to petitioners. 62 Fed. Cl. 521. The court held that the Appropriations Acts created a trust relationship between the United States and the loyal Mdewakanton, that the trust relationship extended to the descendants of the loyal Mdewakanton, and that the trust had the effect of bestowing equitable title to the 1886 lands on the beneficiary class. The court reasoned that the Appropriations Acts had "three key features that show the creation of a trust." *Id.* at 541. First, the statutory language directing the Secretary "to expend the appropriated funds for the Mdewakanton 'as in his judgment he may deem best' * * * functionally appoint[ed] the Secretary of the Interior to serve as the trustee." *Ibid.* (quoting 1888 Appropriations Act § 1, 25 Stat. 229) Second, a provision of

the Acts calling for each Indian to receive "an equal amount in value" constituted "a guideline for the trustee." *Ibid.* (quoting 1889 Appropriations Act § 1, 25 Stat. 993). Third, those statutes provided that funds would remain available even if not spent within the fiscal year, thus "aid[ing] in defining the corpus of the trust." *Ibid.*

The CFC also concluded that the 1980 Act did not terminate the trust because it lacked "an explicitly expressed intention by Congress to terminate the trust." 62 Fed. Cl. at 543. The court held that the 1980 Act only transferred the United States' legal title in the 1886 lands, while equitable title remained with the loyal Mdewakanton. *Ibid.* The court acknowledged that its reading created an unusual "trust on a trust," but it left "that possibility and others * * * to exploration in future proceedings." *Id.* at 544 n.13.

3. On a motion by the United States, the CFC entered an order certifying two questions for interlocutory appeal under 28 U.S.C. 1292(d)(2). Pet. App. 76-111. Specifically, the court certified the questions (1) whether the Appropriations Acts created a trust for the benefit of the loyal Mdewakanton and their descendants, and (2) if so, whether the 1980 Act terminated that trust. *Id.* at 96, 107.

4. The court of appeals accepted the interlocutory appeal and reversed and remanded. Pet. App. 1-75.

With respect to the first certified question, the court of appeals concluded that the 1888, 1889, and 1890 Appropriations Acts did not create a trust. Pet. App. 20-35. The court observed that "[t]he simple statutory directives as to the expenditures authorized by the Appropriations Acts do not evidence an intention on Congress's part to create a legal relationship between the Secretary

of the Interior and the 1886 Mdewakantons in which the Secretary was assigned particular duties as trustee and the Mdewakantons were given enforceable rights as trust beneficiaries." *Id.* at 22. Noting that "the surrounding paragraphs of the same statutes, which provide for the support of other groups of Indians, are clearly just appropriation provisions that do not create trust obligations," the court reasoned that "[i]t is difficult to read the paragraphs relating to the 1886 Mdewakantons as creating a trust relationship." *Id.* at 23. The court further determined that "nothing in the legislative history" of the Appropriations Acts "indicates that they were designed to create a trust relationship." *Id.* at 26. The court also held that nothing in the Department of the Interior's implementation of the statutes suggested that Congress intended to create a trust in the Appropriations Acts. *Id.* at 32-48.

The court of appeals went on to address the second certified question, concluding that, even if the Appropriations Acts created a trust, Congress terminated that trust in the 1980 Act. Pet. App. 62-75. Under that statute, the court observed, "the United States' interest in the lands [was] converted into a trust for the three communities" in the area where the 1886 lands were located, "whereby the United States would hold legal title to the lands and each of the three communities would hold equitable title." *Id.* at 62-63. The court explained that "the [1980] Act is difficult to understand only if viewed in the way [petitioners] view it—as intended to preserve equitable title to the disputed lands in the 1886 Mdewakanton descendants." *Id.* at 66-67. Instead, the court held that, "[i]f the [1980] Act is viewed as creating a trust in which legal title is held by the United States and beneficial title is held by the three communities, the

wording of the Act achieves that purpose clearly and simply." *Id.* at 67.

## ARGUMENT

The court of appeals correctly held both that the 1888, 1889, and 1890 Appropriations Acts did not create a trust and that, even if those statutes did create a trust, the trust was terminated by the 1980 Act. Either of those holdings provides an independent basis for the judgment below, and neither conflicts with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals correctly held that the three Appropriations Acts did not create a trust. Petitioners identify no decision of this Court or any other court of appeals holding to the contrary. Instead, they assert (Pet. 21, 35) that the court of appeals erroneously concluded that the Appropriations Acts did not create a trust because those statutes did not use the words "trust" or "reservation." More generally, petitioners contend (Pet. 32) that the court's analysis conflicts with this Court's "statutory interpretative principles governing Native American trust cases." Such an abstract conflict would not warrant review, and in any event, petitioners' characterization of the decision below is incorrect. As an initial matter, the court of appeals explicitly acknowledged that "a statute need not contain the word 'trust' in order to create a trust relationship," Pet. App. 20, and it nowhere suggested that use of the term "reservation" was a necessary precondition for a trust relationship.

Petitioners' broader criticism of the court of appeals' interpretive approach is similarly flawed. Petitioners rely (Pet. 32-39) on common-law trust principles to argue that the Appropriations Acts created a trust obliga-

tion. But this Court's recent decision in *United States* v. *Navajo Nation*, 129 S. Ct. 1547 (2009), makes clear that analysis of whether there is a trust obligation must begin with an assessment of whether there is a specific right-creating or duty-imposing statutory or regulatory provision. "*If* a plaintiff identifies such a prescription, and *if* that prescription bears the hallmarks of a 'conventional fiduciary relationship,' *then* trust principles * * * could play a role in 'inferring that the trust obligation [is] enforceable by damages.'" *Id.* at 1558 (quoting *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 473, 477 (2003)) (brackets in original). Contrary to *Navajo Nation*, petitioners seek to use common-law trust principles to identify the duty-imposing statutory provision and then to infer a conventional fiduciary relationship. As the court of appeals explained, however, the Appropriations Acts did not create a trust or any specific fiduciary obligations. Instead, they were simply ordinary annual appropriations of public funds for the Secretary to expend for the benefit of certain Indians as part of Congress's effort to aid the Mdewakanton in Minnesota following the 1862 uprising. Pet. App. 27.[2]

Petitioners contend that by recognizing that the Appropriations Acts appropriated public funds "subject to a statutory use restriction," the court of appeals necessarily found that the Acts created specific statutory rights for the loyal Mdewakanton and their lineal de-

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[2] Because petitioners fail to identify a specific statutory obligation or duty with the hallmark of a conventional fiduciary relationship, their suggestion (Pet. 33) that the court of appeals erred in failing to apply what they call the "Fair Inference Rule" is incorrect. That rule would come into play, if at all, only at a later stage of the analysis, in determining whether any statutory obligation is enforceable by damages.

scendants. Pet. 21, 33 (quoting Pet. App. 27). To the contrary, the court of appeals explained that the Appropriations Acts' "limited restrictions" on how the Secretary of the Interior was to spend the appropriated funds "are consistent with the kinds of directions that are routinely contained in appropriations statutes dictating that the appropriated funds are to be spent for a particular purpose." Pet. App. 22. And in any event, while the Acts did provide some restriction on how the Secretary may expend the appropriated funds, each statute gave the Secretary considerable discretion: he was to spend the funds "as in his judgment he may deem best," and even the directive that each Indian receive "an equal amount in value" was to be fulfilled only "as far as practicable." 1888 Appropriations Act § 1, 25 Stat. 229; 1889 Appropriations Act § 1, 25 Stat. 993. That broad discretion is inconsistent with the existence of a specific statutory right in, or duty to, the loyal Mdewakanton and their lineal descendants.

Moreover, the group that was to benefit from the appropriated funds—the beneficiaries of the supposed trust—varied in each of the Appropriations Acts. The 1888 statute referred to "full-blood Indians" who had resided in Minnesota since 1886 and had severed their tribal relations. 1888 Appropriations Act § 1, 25 Stat. 228-229. The 1889 statute referred to "full-blood Indians" who had resided in Minnesota since 1886 "or who were then engaged in removing to said State." 1889 Appropriations Act § 1, 25 Stat. 992. And the 1890 statute referred to "full and mixed blood Indians" who had resided in Minnesota since 1886 "or who were then engaged in removing to said State." 1890 Appropriations Act § 1, 26 Stat. 349. The failure of the Acts to specify a definite and consistent group of "beneficiaries" fatally

undermines petitioners' theory that Congress intended to create a trust for the individual loyal Mdewakanton. Similarly, the failure of any of the Acts to mention heirs or descendants is inconsistent with petitioners' theory that the beneficiaries of the supposed trust would include the lineal descendants of the loyal Mdewakanton.[3]

2. Petitioners suggest (Pet. 30-31) that the decision below is inconsistent with this Court's recent decision in *Carcieri* v. *Salazar*, 129 S. Ct. 1058 (2009), but it is not. *Carcieri* addressed the Secretary's authority under the IRA to acquire land and hold it in trust "for the purpose of providing land for Indians." *Id.* at 1060 (quoting 25 U.S.C. 465). Because the IRA defines the term "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," this Court concluded that the statute "limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." *Id.* at 1060-1061 (quoting 25 U.S.C. 479). As the court of appeals correctly concluded, the Secretary's authority under the IRA is not relevant to the questions raised in this case—whether the Appropri-

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[3] Petitioners assert (Pet. 25) the decision below conflicts with Ninth Circuit decisions "recogniz[ing] that when federal obligations are to be enforced, there exists federal subject matter jurisdiction." But because the court of appeals held that the Appropriations Acts did not create any specific obligation with respect to the loyal Mdewakanton and their lineal descendants, it had no occasion to consider the CFC's jurisdiction to enforce such obligations. For similar reasons, petitioners are incorrect when they suggest (Pet. 24) that the court of appeals held that federal courts lack subject-matter jurisdiction "if Interior's obligations to a definitive class of Indians affect present-day post-1934 IRA non-tribal community governments." The decision below was not based on the purported effect petitioners identify.

ations Acts created a trust and whether, if they did, the 1980 Act terminated any such trust. Pet. App. 53 n.8.

3. In an argument presented for the first time in this Court, petitioners assert (09-580 Pet. 28-31) that a trust was actually created by the 1863 Act, and the Appropriations Acts merely added to that trust's corpus. Petitioners' theory below, by contrast, was that the Appropriations Acts created a trust. See, *e.g.*, Pet. C.A. Br. 4 ("The CFC correctly determined that the Appropriations Acts created a trust and the 1980 Act did not terminate the trust."), *id.* at 26 ("The Appropriations Acts created a trust."). That theory was the basis for the CFC's grant of partial summary judgment, see 62 Fed. Cl. at 541, and it was the question certified for interlocutory appeal, see Pet. App. 96 ("Whether a trust was created in connection with and as a consequence of the 1888, 1889, and 1890 Appropriations Acts"). Because petitioners' argument based on the 1863 Act was neither pressed nor passed upon below, it does not warrant this Court's review. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *Auer* v. *Robbins*, 519 U.S. 452, 464 (1997).

In any event, the argument lacks merit. In the 1863 Act, Congress gave the Secretary discretionary authority to "set apart of the public lands, not otherwise appropriated, eighty acres in severalty to each individual [of the Mdewakanton band] who exerted himself in rescuing the whites" from the 1862 revolt. 1863 Act § 9, 12 Stat. 654. The Secretary never exercised that authority. Pet. App. 8. There is no basis for concluding that the Secretary's unexercised authority to set aside unappropriated public lands created a trust, the corpus of which was then supplemented by the Appropriations Acts 25 years later.

4. The court of appeals also concluded that even if the Appropriations Acts did create a trust, the 1980 Act terminated that trust. Pet. App. 62-75. That holding is correct, and it provides an independent basis for the decision below.

Petitioners argue (Pet. 44-45) that Congress must use plain and unambiguous language when it terminates a trust, and the court of appeals erred in failing to apply that standard to its interpretation of the 1980 Act. That argument is incorrect for two reasons. First, as the court of appeals explained, any trust created by the Appropriations Acts was, "at most, created only by operation of law." Pet. App. 70 & n. 13. Thus, "Congress's failure to include express language of trust termination cannot be regarded as indicative of an intention not to alter the previously legal relationship among the parties." *Ibid.*[4]

Second, even if there were a clear-statement requirement in the context of this case, it would be satisfied by the patent inconsistency between the provisions of the 1980 Act and the continuation of any preexisting trust. The 1980 Act provides for the United States to hold the 1886 lands in trust for the respective communities—specifically, the "Shakopee Mdewakanton Sioux Community of Minnesota," the "Lower Sioux Indian Community

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[4] Notably, the text of the 1980 Act also supports the conclusion that Congress did not view the Appropriations Acts as creating a trust. The 1980 Act refers to the 1886 lands as lands that were then being held "for the use or benefit of"—not "in trust for"—certain Mdewakanton Sioux Indians. § 1, 94 Stat. 3262. The Act then declares that such lands are to be held in "trust" for the three communities. *Ibid.* Congress's use of the word "trust" to describe the new arrangement but not the old one reinforces the conclusion that Congress believed the 1886 lands were not held in trust prior to the 1980 Act.

of Minnesota," and the "Prairie Island Community of Minnesota." 1980 Act § 1, 94 Stat. 3262. The United States cannot simultaneously hold those same lands in trust for the loyal Mdewakanton and their lineal descendants. Under petitioner's construction of the 1980 Act, the statute creates an anomalous "trust on a trust," whereby the 1886 lands are now held by the United States in trust for the communities, who in turn are beneficiaries of that trust as well as trustees for the loyal Mdewakanton and their lineal descendants. Pet. App. 67. Petitioners have identified no other statute under which Congress created such an unusual arrangement. Instead, as the court of appeals observed, the natural conclusion is that Congress intended the 1980 Act to terminate any trust that might have been created by the Appropriations Acts rather than to create (apparently for the first time) a "trust on a trust." *Ibid.*

As the court of appeals explained, that conclusion is reinforced by the 1980 Act's purposes and legislative history. Pet. App. 65-66. In enacting the 1980 Act, Congress was concerned that the 1886 lands and lands subsequently acquired in trust for the communities had created a "checkerboard pattern of land use[] that severely diminishe[d] the effectiveness of overall land management programs and community development," *Senate Report* 2, and it sought to "eliminate this distinction by providing that the 1886 lands will be held in trust by the United States for the benefit of the three Mdewakanton communities," *House Report* 2. Petitioner's interpretation, by creating an unprecedented "trust on a trust,"

would only compound the problem that Congress sought to solve.[5]

5. Finally, petitioners contend (09-580 Pet. 32-42) that the United States should be judicially estopped from arguing in this case that the Appropriations Acts did not create a trust or that the 1980 Act terminated any trust. This Court has never held that judicial estoppel is available against the United States, cf. *OPM* v. *Richmond*, 496 U.S. 414, 419-424 (1990), and this case is not an appropriate vehicle for resolving that question because petitioners have failed to show that the elements of judicial estoppel would be satisfied in any event. In order for judicial estoppel to apply, petitioners must demonstrate, first, that the government's current position is "clearly inconsistent" with its earlier position; second, that the government persuaded a court to accept that earlier position such that judicial acceptance of the government position here would create the perception that a court was misled; and third, that the government's inconsistent positions would give it an unfair advantage or impose an unfair detriment on petitioners. *New Hampshire* v. *Maine*, 532 U.S. 742, 750-751 (2001) (citations omitted). Here, petitioner's argument fails at the first step. As the court of appeals observed in rejecting petitioners' claim of judicial estoppel, there is nothing "said by the government attorneys in the refer-

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[5] Petitioners also suggest (Pet. 43) that this aspect of the decision below is inconsistent with *Carcieri*, which, they say, required the court of appeals to determine "who is the ultimate beneficiary of the 'lands' after the 1980 Act." But as explained above, *Carcieri* concerned the interpretation of the IRA, whereas the disposition of the lands at issue here is governed by the 1980 Act. And Congress unambiguously declared in the 1980 Act that the United States holds the 1886 lands in trust for three Indian communities.

enced cases that would support the [petitioners'] claims in this one." Pet. App. 61.

Petitioners base their judicial-estoppel argument (09-580 Pet. 33-36) on a position they allege the United States took in *Cermak* v. *United States*, 478 F.3d 953 (8th Cir. 2007), and *Cermak* v. *Babbitt*, 234 F.3d 1356 (Fed. Cir. 2000), cert. denied, 532 U.S. 1021 (2001). They assert (09-580 Pet. 33-34) that the United States argued in that litigation that "the 1863 Act and/or the Appropriations Acts created a trust." That is incorrect. To the extent that the United States discussed the lands at issue as having been held in trust for the use of certain individuals, see, *e.g.*, 09-580 Pet. 34-35, it was in the context of the relationship between the United States and a *particular individual* who held land under a specific Indian Land Certificate. The United States did not take the position that the Appropriations Acts created a trust of which the loyal Mdewakanton and their lineal descendants are beneficiaries. Indeed, fundamental to the United States' position in *Cermak* was that no one else, including especially Cermak's heirs, held any rights in the assignment. See, *e.g.*, *Cermak*, 478 F.3d at 957. Thus, the government's position in the two cases is the same.

Petitioners also maintain (09-580 Pet. 35-37) that the United States took the position in *Cermak* that the 1980 Act did not terminate any trust created by the Appropriations Acts. That is similarly incorrect. As is apparent from the quotations in the petition, what the United States said was that, with respect to land held under an Indian Land Certificate at the time of the 1980 Act, Section 3 of the 1980 Act preserved the existing certificate holder's right. The United States' position throughout this case—that the 1980 Act terminated whatever trust

(if any) was created by the Appropriations Acts—is consistent with its position that the 1980 Act did not terminate the interest of an Indian Land Certificate holder in his or her certificate. See Pet. App. 61-62; see also *id.* at 71.

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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